

Aberystwyth University

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Lewis, Kerry

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The framework for environmental regulation in Wales: Natural Resources Wales speaks with 'One Voice'

Has the statutory voice for nature been silenced?

by Kerry Lewis, Aberystwyth University

Abstract

Natural Resources Wales (NRW) was created from the amalgamation of the Environment Agency Wales (EAW), the Countryside Council for Wales (CCW) and the Forestry Commission Wales. The statutory functions of the three legacy environmental bodies had previously overlapped to some degree, and the rationale for a single body was to streamline activities and resources. However, the legacy bodies had differing - potentially conflicting - interests and duties, for example, in relation to balancing obligations regarding decisions affecting nature conservation. NRW's duties now differ according to function. Furthermore, in certain circumstances, legislation required statutory consultation between the former bodies, such that EAW had to seek nature conservation advice from CCW as part of the environmental permitting process. NRW is now required to carry out such consultation internally. This research examines the duties of EAW, CCW and NRW with regard to nature conservation, and critically analyses the effect of the creation of a single body on the statutory consultation requirements. It concludes that the duties imposed on NRW with regard to nature conservation are weaker than those of the former CCW, and that the independence of the nature conservation body as consultee and the transparency of the statutory consultation process has been compromised by the creation of the single body.

1. Introduction

As part of the Living Wales Programme, Natural Resources Wales (NRW) assumed the responsibilities of Environment Agency Wales (EAW), Countryside Council for Wales (CCW) and Forestry Commission Wales (FCW) (the 'legacy bodies') on 1 April 2013.¹ Functions governing the regulation and management of the environment in Wales had previously been separated across the legacy bodies:² CCW was responsible for landscape and conservation designations and wildlife protection; EAW regulated pollution control, water quality and flood management; and FCW managed and regulated forestry. The rationale for a single body was to streamline resources and integrate management of the environment. The next phase is the introduction of a framework based on the ecosystems approach,³ as proposed in Part I of the recently tabled Environment (Wales) Bill.⁴

In delivering their statutory functions, the legacy bodies had had potentially conflicting duties. It is no secret that tensions arose between CCW as nature conservation advisor and EAW as regulator of pollution⁵ - particularly where EAW was required to consult CCW.⁶ With the potential for these advisory and regulatory functions to pull in different directions there are concerns⁷ that bringing together these activities into a single body, which speaks with

¹ The Natural Resources Body for Wales (Functions) Order 2013 (SI 2013, No. 755) (W 90) (hereafter 'NRW Functions Order')

² Which have all been abolished in Wales.

³ Welsh Government, Towards the Sustainable Management of Wales' Natural Resources: Consultation on proposals for an Environment Bill, WG 19631 (2013)

⁴ See <http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?lId=12572> accessed 5 June 2015

⁵ See, for example, BBC News Online, 'Pembroke power station: how agencies were opposed over permit', 15 February 2012 <<http://www.bbc.co.uk/news/uk-wales-south-west-wales-17032430>> accessed 5 June 2015

⁶ E.g. under the statutory consultation processes set out in Wildlife and Countryside Act 1981, s.28 (hereafter 'WCA 1981') and Conservation of Habitats & Species Regulations 2010 (SI 2010, No. 490), Paragraph 61 (hereafter 'Habitats Regulations 2010')

⁷ Responses to Welsh Government Consultation Paper: Natural Resources Wales: Proposed Arrangements (2012)

'one voice'⁸ on the environment and where consultation and decision-making affecting nature conservation take place behind closed doors, results in a loss of transparency - and thus public confidence - in the process of balancing the three pillars of sustainable development.

Little academic research is available. Whilst certain disagreements between CCW and EAW may be common knowledge,⁹ it has, perhaps, not been necessary to consider the balance of power, since each has been able to voice its own view in the public domain. However, this duality has gone and NRW functions 'as a single 'one voice' organisation'.¹⁰ A small but concerned proportion of respondents to the Welsh Government's initial and additional consultations on the proposed single body commented on issues relating to conflict of duties, separation of functions and transparency in the new organisation.¹¹ One respondent eloquently encapsulates the key themes which emerged:

... there will be a loss of checks and balances that have developed within the existing system. At present each of the three bodies addresses the environmental agenda from a different standpoint, and each of them is kept aware of the need to take account of issues beyond their own concerns because their proposals will be subject to open scrutiny by the others. Thus the Environment Agency takes account of the needs of biodiversity when proposing flood mitigation measures, because it knows

⁸ Natural Resources Wales, 'Briefing for the Environment and Sustainability Committee: Natural Resources Wales' first year in operation' (7 May 2014) at 3
<<http://www.senedd.assemblywales.org/documents/g2191/Public%20reports%20pack%20Wednesday%2007-May-2014%2009.20%20Environment%20and%20Sustainability%20Committee.pdf?T=10>> accessed 8 June 2015

⁹ Above n. 5

¹⁰ Above n. 8

¹¹ 'Natural Resources Body for Wales: Additional Consultation - responses Part 1', including The Law Society at 145, Welsh Conservatives at 154, Ceredigion County Council at 167; 'Natural Resources Body for Wales: Additional Consultation - responses Part 2' including RSPB from 33 and CCW itself from 190.

that its activities will be scrutinised by CCW. The danger is that bringing the bodies together may weaken such influence, and furthermore may lose the opportunity to engender wider debate because the issues are discussed in private and outside bodies and individuals will not be aware of the issues and thus be unable to contribute to the quality of final decisions.¹²

One academic noted the proposals with interest,¹³ whilst a practising environmental lawyer shared some of the concerns noted above: the legacy bodies 'each have a variety of functions and it is difficult to envisage one body carrying out some of the conflicting roles that they have, in particular, between policy implementation and enforcement....' and questioned whether the single body would 'still deliver on a smaller scale for specific ecosystems and important biodiversity areas'.¹⁴

It is clear that some of the key drivers for the creation of NRW were organisational efficiency and financial savings, as well as regulatory and management advantages:¹⁵ a single Wales-only body would combine the commercial, conservation and regulatory expertise of the legacy bodies, allow for locally-based, culturally sensitive decision-making and do away with triplication of corporate functions such as human resources, procurement and IT services.¹⁶ This study does not examine those claims. Nor does it debate the value or

¹² 'Natural Resources Wales: Proposed Arrangements for Establishing and Directing a New Body for the Management of Wales' Natural Resources - Consultation responses Part 1', Steve Bolchover at 145

¹³ L. Warren, 'Legislation and Policy: New Approaches to Nature Conservation in the UK' (2012) 14 Env L Rev 44; 'A Single Environment Body for Wales' (124) Environmental Law Bulletin

¹⁴ N. Jones, 'Opinion: Sustaining a Living Wales' (2012) 14 Env L Rev 93

¹⁵ See Welsh Government, Single Environment Body in Wales: Business Case, WG 14312 (2011); Written Repsonse by the Welsh Government to the report of the Environment and Sustainability Committee: The Business Case for a Single Environment Body (2012); Welsh Government, Natural Resources Wales: Proposed Arrangements for Establishing and Directing a New Body for the Management of Wales' Natural Resources WG14766 (2012)

¹⁶ Welsh Government, Natural Resources Wales: Proposed Arrangements for Establishing and Directing a New Body for the Management of Wales' Natural Resources WG14766 (2012) at 8 and 9.

importance of nature conservation and biodiversity. The Living Wales Programme followed the announcement¹⁷ that Wales would not meet its 2010 biodiversity targets despite domestic¹⁸ and international commitments.¹⁹ This failure was not unique to Wales and signatories to the Convention on Biological Diversity subsequently agreed to renewed efforts to increase biodiversity by 2020.²⁰ The Welsh targets²¹ directly link the reversal of biodiversity loss to the management of sites designated for their nature conservation value. As such, if Wales is to meet its targets, robust mechanisms are needed to ensure appropriate protection of those sites.

This research, therefore, seeks to determine whether, in pushing forward to achieve its drivers, WG has adequately addressed the practical and legal consequences of the formation of a single body with regard to the delivery and transparency of its nature conservation functions. It examines the relationship between the former CCW and EAW and provides an analysis of the functions and duties of the statutory bodies in the context of nature conservation, prior to, and following, the creation of NRW. The paper goes on to examine the potential for conflict between the advisory role of the nature conservation body and the regulatory role of the competent authority for pollution control decisions and critically assesses the structures and procedures in place to overcome the potential conflicts of interest between - and the loss of transparency in delivering - the functions and duties of the legacy bodies during the establishment and early operational phase of NRW.

¹⁷ Welsh Assembly Government, Written Statement by the Minister for the Environment, Sustainability and Housing on Biodiversity, 18 January 2010

¹⁸ Welsh Assembly Government, Environment Strategy for Wales (2006)

¹⁹ Convention on Biological Diversity (1992), art. 6

²⁰ Convention on Biological Diversity, Aichi Biodiversity Targets (2011)

²¹ Above n. 18 at Outcomes 19, 20 and 21.

2. Delivering nature conservation in Wales

2.1. The statutory bodies

2.1.1. The Countryside Council for Wales (CCW)

CCW was established as a corporate body in 1991 when the Environmental Protection Act 1990 created three new nature conservation bodies, one each for England, Scotland and Wales. Prior to that "the countryside" had been regulated and managed on a UK wide basis by the Nature Conservancy Council (NCC), responsible for sites designated for their nature conservation value, and the Countryside Commissions (CCs),²² concerned with protecting "natural beauty". Both of these remits included conservation of flora and fauna, but were managed quite separately from each other, and, for example, from the pollution control remit of the then National Rivers Authority, subsequently the Environment Agency. In 1991, the new nature conservation bodies were constituted with broadly similar functions for the land area in question, save that the CC's role was subsumed into CCW in Wales, whereas England continued to have two separate bodies.²³ CCW thus brought together the delivery of two previously separate roles. In 2011/12, its penultimate year of operation, CCW employed 466 staff and its annual budget was £42million.²⁴

The core means of legislative protection for nature conservation in the UK is a network of sites designated for their habitat or the presence of a particular species, including Sites of

²² One for England and Wales, and one for Scotland.

²³ English Nature and the Countryside Agency (both now subsumed into Natural England). ss.128 - 132 Environmental Protection Act 1990 c43

²⁴ Single Environment Body in Wales Business Case WG14312 (2011) at 16.

Special Scientific Interest (SSSIs)²⁵ and European sites.²⁶ The concept of 'natural beauty' is separate and is protected through landscape designation such as National Parks (NPs) and Areas of Outstanding Natural Beauty (AONBs).²⁷ Between 1991 and the creation of NRW, responsibility for these matters lay with CCW and its duties differed according to the function exercised.

In designating NPs and AONBs, CCW was required to discharge its functions for the conservation and enhancement of natural beauty and amenity of the countryside, as well as encouraging facilities and opportunities for open-air recreation and the study of nature.²⁸ The conservation of natural beauty is defined as including the conservation of flora, fauna and geological and physiographical features, echoed in the language of SSSIs.²⁹ It was also required to 'have regard to the social and economic interests of rural areas in Wales'.³⁰

By contrast, the nature conservation functions - which included advising, commissioning research and the creation and management of sites of nature conservation importance - were conferred for the purpose of 'nature conservation and fostering the understanding' of it.³¹ In discharging any of these nature conservation functions, CCW had a duty 'to take appropriate account of actual or possible ecological changes',³² and adopted the precautionary principle.

²⁵ WCA 1981, s.28

²⁶ Under the Habitats Regulations 2010

²⁷ National Parks & Access to the Countryside Act 1949

²⁸ Environmental Protection Act 1990, s.130(2) (hereafter 'EPA 1990')

²⁹ WCA 1981, s.28(1)

³⁰ EPA 1990, s.130(2)

³¹ EPA 1990, s.131

³² EPA 1990, s.131(2)

It is clear that CCW's priority and core purpose was to protect and conserve the natural environment. With regard to its NP and AONB functions it also had a lesser requirement to 'have regard to' social and economic matters in rural areas. By contrast, the legislative regime for the creation, management and protection of SSSIs is based on ecological criteria alone: it neither creates a balancing duty nor does it refer to social or economic concerns. Although this duty and CCW's approach to its fulfilment were not without critics,³³ decision-making was based on scientific evidence and, in order to comply with its statutory duty to 'take appropriate account of *possible* ecological change',³⁴ where there was any doubt as to environmental impact, CCW had to err on the side of caution.

2.1.2. Environment Agency Wales (EAW)

The Environment Agency (EA) was established as a corporate body in 1996 under the Environment Act 1995 as the successor body to: the National Rivers Authority in England and Wales,³⁵ which had hitherto been responsible for water resource management, control and pollution of water resources, land drainage, fisheries, and navigation in relation to rivers; and Her Majesty's Inspectorate of Pollution which had regulated the control of pollution under Part II of the EPA 1990, covering emissions to land and air, as well as waste regulation functions. When the EA was formed, concerns were raised about its vast remit and its focus on the needs of industry, whilst others welcomed the integration of an increasingly complex system of environmental regulation into a 'one-stop shop', noting the

³³ For example, 'CCW is regarded by many business people as the biggest single block on economic recovery in Wales. This view arises from their complete lack of accountability, their intensely focussed attitude towards animals and plants to the exclusion of all other issues and the fact that they have no requirement to consider the economic impact of any of their decisions', per David Randolph above n.12 at 115

³⁴ My emphasis

³⁵ The Scottish Environmental Protection Agency was created to cover similar functions in Scotland.

difficulties of merger and the need to resolve cultural differences across the legacy organisations.³⁶ Under the devolution settlement, most ministerial functions relating to the functioning of the EA in Wales were transferred, such that EAW became an executive Assembly-sponsored public body, receiving grant aid from WG, whilst remaining part of the EA England and Wales corporate entity. Its annual budget for 2011/12, its penultimate year of operation, was £88million and the total number of "planned posts" was 1074.³⁷

In discharging its functions, the principal aim of EAW was

(subject to and in accordance with the provisions of this Act or any other enactment and taking into account any likely costs) ... to protect or enhance the environment, taken as a whole, so as to make a contribution towards attaining the objective of achieving sustainable development.³⁸

In Wales, sustainable development aims to meet the needs of the current generation without compromising the needs of future generations to meet their own needs, and combines economic and social development as well as environmental protection.³⁹ It is, therefore, apparent that the statutory objectives of EAW, whilst including environmental concerns, were balanced against the social and financial concerns of people and businesses. Furthermore, its aim was subject not only to costs, but also to the other provisions under

³⁶ William Howarth, 'Self-monitoring, Self-policing, Self-incrimination and Pollution' (1997) 60 MLR 220; Christopher Miller and Stephen Holmes, 'Regulation of UK Industrial Air Pollution in the 1990s: Continuity and Change' (1997) 9 J Env L 303

³⁷ Above n. 24

³⁸ Environment Act 1995, s.4(1) (hereafter 'EA 1995')

³⁹ Recently enshrined in the Well-being of Future Generations (Wales) Act 2015, ss. 2 and 5

the EPA 1990, leading to difficulties in interpretation and the view that the provision fails to create rights that are legally enforceable.⁴⁰

EAW's duties regarding nature conservation varied according to circumstance. For proposals relating to any 'non-pollution control' functions, it had to

exercise any power conferred on it with respect to the proposals [so] as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest

but only in 'so far as may be consistent' with other legislation or guidance issued to it.⁴¹ It was thus a secondary duty, which could, and indeed in some cases should, be subordinate to other considerations. For proposals relating to pollution control functions,⁴² the duty was weaker: EAW was required merely 'to have regard to the desirability of conserving and enhancing natural beauty and of conserving flora, fauna and geological or physiographical features of special interest'.⁴³ The 'have regard to' construction creates only a weak duty, with a low threshold for compliance: 'At most it ensures that conservation is a relevant consideration when discretionary decisions are being taken. But how much weight, if any, should be given to such issues is wholly for the authority to determine'.⁴⁴ Arguably then, EAW could have given no weight to nature conservation matters were it considered that other factors were more pressing - particularly in relation to pollution control.

⁴⁰ See e.g. S. McGillivray, D. Bell, O. Pedersen, *Environmental Law*, 8th edn (Oxford University Press, 2008) 124 or A. Ross, 'Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes' (2008) 20 J Env L 35 at 40

⁴¹ EA 1995, s.7(1)(a)

⁴² As defined in EPA 1990, s.5

⁴³ EA 1995, s.7(1)(b)

⁴⁴ I. Roberts and C. Reid, 'Nature Conservation Duties: More appearance than substance' (2005) 17 JPL 1 62 at 166

2.1.3. Natural Resources Wales (NRW)

NRW was established in July 2012⁴⁵ and became operational as the sole environmental statutory body in Wales in April 2013,⁴⁶ inheriting from the legacy bodies (which have ceased to exist in Wales) numerous roles and functions relating to the environment, countryside, conservation, wildlife and pollution. It has become a principal advisor to the Welsh Government, a statutory consultee on planning applications, the designating authority for SSSIs and AONBs, and has regulatory responsibilities such as permitting, licensing and enforcement, as well as responsibility for flood risk management. In addition, it owns land, operates visitor centres and provides outdoor recreation services. It is a Welsh Government Sponsored Body with a budget of £180 million and employs 1900 staff.⁴⁷

NRW's statutory purpose is to ensure that the environment and natural resources of Wales are sustainably maintained, sustainably enhanced and sustainably used, where sustainably means 'with a view to benefitting, and in a manner designed to benefit, the people, environment [which includes all living organisms and ecosystems] and economy of Wales in the present and in the future'.⁴⁸ Immediate tensions are apparent in the wording of the statutory purpose: given their ordinary and natural meaning the maintenance, enhancement or use of a resource have different outcomes. Whereas maintenance suggests a preservation of the status quo, enhancement implies an improvement in the condition of

⁴⁵ Natural Resources Body for Wales (Establishment) Order 2012 (SI 2012/1093) (W230)

⁴⁶ The Natural Resources Body for Wales (Functions) Order 2013 SI 2013/755) (W 90)

⁴⁷ <http://naturalresources.wales/about-us/what-we-do/?lang=en> accessed 5 June 2015. Above sections 2.1.1. and 2.1.2 for budget and staffing figures for CCW and EAW. In 2011/12 FCW's annual budget was £44million and it employed staff in 438 posts. Above n. 24

⁴⁸ Natural Resources Body for Wales (Establishment) Order 2012, para. 4 (hereafter 'NRW Establishment Order') as amended by NRW Functions Order

a resource.⁴⁹ Both indicate that there should neither be a detriment to the resource nor any degradation in its condition. Whether either of these requirements can be achieved when a resource is used, since that suggests some form of consumption, is, perhaps, a matter of interpretation and dependent on context: for example, using a timescale or a geographical area as reference could mean that that there is no detriment to an overall location, over, say, the course of a year.⁵⁰

Furthermore, NRW is required to ensure that any maintenance, enhancement and use are sustainable - thus requiring it to balance social, environmental and economic needs. The Welsh Ministers may issue statutory guidance to NRW with respect to the manner in which it should exercise its functions so as to give effect to its purpose, which NRW must take into account in exercising its functions,⁵¹ as well as directions as to the exercise of its functions, with which NRW must comply.⁵² Whilst such guidance or directions might assist NRW in complying with its statutory purpose, it raises the concern of political interference in the decision-making processes of NRW, which was established as an arms-length body.

A number of supplementary duties are imposed on NRW, which amalgamate the duties of the legacy bodies, resulting in a patchwork of requirements. The legislation requires NRW to exercise its functions so as to *further*⁵³ nature conservation⁵⁴ and the conservation and

⁴⁹ Borrowing from planning case law, see e.g. *South Lakeland District Council Appellants v Secretary of State for the Environment and Another* [1992] 2 AC 141

⁵⁰ Note that Environment (Wales) Bill, para. 3, proposes an amendment to NRW's statutory purpose, which, on the face of it, addresses this inherent contradiction.

⁵¹ NRW Establishment Order, para. 5

⁵² NRW Establishment Order, para. 11

⁵³ My emphasis.

⁵⁴ This continues to mean the conservation of flora, fauna or geological or physiographical features.

enhancement of natural beauty and amenity,⁵⁵ which, on the face of it, indicates a positive duty to improve nature and natural beauty - but disapplies it in relation to pollution control and forestry functions.⁵⁶ Furthermore, this positive duty to benefit the environment is balanced against the need for NRW to 'have regard to the health and social well-being of individuals and communities and the economic well-being of individuals, businesses and communities',⁵⁷ as well as taking into account the likely costs (including costs to the environment) and benefits of exercising or not exercising any of its powers.⁵⁸

In exercising its nature conservation functions NRW must have regard to actual or possible ecological changes.⁵⁹ This construction suggests that an objective analysis of scientific information based on a precautionary approach is necessary in decisions pertaining to nature conservation. However, this weak duty to 'have regard' to such matters is a diluted version of CCW's duty to 'take appropriate account of' ecological change.⁶⁰ By contrast, in exercising its pollution control functions, NRW is not required to further nature conservation, nor take account of ecological change; instead it must have regard to the 'desirability of nature conservation and of conserving and enhancing natural beauty and amenity'.⁶¹ Although no guidance has been issued, and the Explanatory Note⁶² does not address the point, it may be inferred that this duty is intended to achieve a different effect to that for nature conservation functions. The duty with regard to pollution control functions is yet weaker - framed as it is as in terms of a subjective notion of 'desirability', the

⁵⁵ NRW Establishment Order, para. 5A(1)

⁵⁶ NRW Establishment Order, para. 5A(2)

⁵⁷ NRW Establishment Order, para. 5E

⁵⁸ NRW Establishment Order, para. 8

⁵⁹ NRW Establishment Order, para. 5B

⁶⁰ EPA 1990, s.131(2)

⁶¹ NRW Establishment Order, para. 5A(3)

⁶² Explanatory note to NRW Functions Order

need to take account of social and economic need, and the cost of (not) exercising its powers - such that the decision-maker may, in its discretion, place little or no weight on nature conservation matters when determining pollution control applications.

The Natural Environment and Rural Communities Act duty that

Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity⁶³

applies to NRW. It has been welcomed by organisations concerned with biodiversity, but has been described as patchily implemented,⁶⁴ 'not comprehensive enough',⁶⁵ 'weak and woolly',⁶⁶ with public bodies having no duty to 'do' anything, and there being no sanction for non-compliance. Given the complex nature of NRW's statutory duty, which differs according to function, and the fact that it has express nature conservation duties, the s.40 NERCA duty seems to impose no additional requirement on NRW. Having taken into account its duty to further nature conservation, or to have regard to its desirability, and the requirement to have regard to actual or possible ecological changes where nature conservation is concerned, it is likely that, if those functions properly require it, NRW will already have had regard to the purpose of conserving biodiversity. These functions, combined with the weak 'have regard to/proper exercise of functions' construction of the s.40 NERCA duty arguably result in no additional benefit to biodiversity in this context.

⁶³ Natural Environment & Rural Communities Act 2006, s. 40 (hereafter 'NERCA 2006')

⁶⁴ National Assembly for Wales, Sustainability Committee *Inquiry into biodiversity in Wales* (2011) at para. 116

⁶⁵ Ibid. per Ceredigion County Council at para. 119

⁶⁶ Ibid. per Welsh Association of National Park Authorities at para. 120

The combined effect of the NRW duties appears to be that, for nature conservation functions, the statutory requirements of NRW are less robust than those of CCW. Concerns over the weakening of the duty were raised during the consultation, with one respondent seeking legal advice as to the lawfulness of WG's proposals.⁶⁷ The Welsh Ministers have power to make a legislative order only if they consider that the order does not remove any 'necessary protection'.⁶⁸ Under the pre-merger regime, nature conservation was prioritised in CCW's decision-making and advisory processes - providing significant protection to species and habitats through the application of the precautionary principle. Presumably this approach was adopted to provide the level of protection for sites and species of conservation importance which was thought to be 'necessary' at the time. NRW's duty to balance ecological criteria against social and economic concerns even where nature conservation is concerned, undermines that 'necessary' protection, despite WG's claim that it intended to - and indeed was legally required to - 'provide the body with similar conservation duties in respect of its functions as those that exist[ed pre-merger]'.⁶⁹

2.2. Statutory consultation: conservation v consent

Prior to the creation of NRW, statutory procedures required the pollution control regulator (EAW) to consult the nature conservation body (CCW) for advice where EAW's decision might affect a SSSI⁷⁰ or a European site.⁷¹ These statutory consultation requirements continue to bind NRW and are examined below.

⁶⁷ RSPB Cymru - see 'Natural Resources Body for Wales: Additional Consultation - responses Part 1' from 33

⁶⁸ Public Bodies Act 2011, s.16 (hereafter 'PBA 2011')

⁶⁹ Letter from Welsh Minister for Environment and Sustainable Development to Chair of the Environment and Sustainability Committee, 27 September 2012

⁷⁰ WCA 1981, s.28I

⁷¹ Habitats Regulations 2010, para. 61(5)

2.2.1. Protecting SSSIs: Consultation under s.28I WCA 1981

Pre-merger, on receiving a permit application, EAW was required to determine the likely effect of the proposed activities on any SSSIs, in accordance with its duty to

take reasonable steps, consistent with the proper exercise of [its] functions to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special interest.⁷²

EAW guidance⁷³ advised the permitting officer to check, for example: that all relevant pathways and receptors had been identified; that all sources of potential damage had been taken into account; that the list of 'operations likely to damage' had been used to determine whether damage would be likely to occur; and to consult with colleagues if necessary. The officer was then required to complete a form indicating EAW's compliance with s.28G. Where the permitting officer concluded that activities associated with a permit application were likely to damage the features of a SSSI, the duty to consult CCW under s.28I was triggered. EAW would give notice of the proposed operations to CCW^{74,75} which had 28 days to respond. It was open to CCW to 'advise against permitting the operations, or advise that certain conditions should be attached'.⁷⁶ On receipt of CCW's advice, the EAW permitting officer could issue, condition or refuse the consent, taking the advice from CCW into account in the determination decision.⁷⁷

⁷² WCA 1981, s.28G(2)

⁷³ Environment Agency, Applying the CRow Act 2000 to permit applications that could impact SSSI, 7 February 2013

⁷⁴ Ibid.

⁷⁵ WCA 1981, s.28I(2)

⁷⁶ WCA 1981, s.28I(6)

⁷⁷ Above n. 73

Presumably so as not to fetter the discretion of the decision-maker, neither the guidance note, nor the Environmental Permitting Guidance⁷⁸ give any further indications as to the weight to be given to CCW's advice. Where EAW proposed to issue the consent against CCW's advice, but could not reach agreement with the CCW advisor, a second formal notice was issued to CCW, stating how CCW's advice had been taken into account.⁷⁹ CCW then had 21 days to:

- Accept EAW's decision to permit;
- Seek director level resolution of the dispute;
- Refer the case to the Ministers; or
- Seek judicial review of the decision.⁸⁰

Given the merger of the conservation functions of CCW and the permitting functions of EAW into NRW, one might have expected amending legislation to reflect the existence of a single body in the statutory consultation process. In fact, the legislation simply substitutes 'Natural Resources Body for Wales' for any reference to CCW and EAW, resulting in the somewhat ridiculous position that NRW, as permitting authority under the EPR 2010, is required to 'consult' with itself as nature conservation body under the s.281 WCA 1981 - contrary to WG's claim that the consultation requirements will not be needed.⁸¹ The procedures are

⁷⁸ DEFRA, Environmental Permitting Guidance: Core Guidance for the Environmental Permitting (England & Wales) Regulations 2010 (March 2013)

⁷⁹ WCA 1981, s.281(6)(a)

⁸⁰ Above n. 73

⁸¹ Welsh Government, Natural Resources Body for Wales (additional consultation), WG 16076 (2012) at 20

under review by NRW, but at present it continues to refer to the former EAW guidance, with no amendment.⁸²

2.2.2. Protecting European Sites: Appropriate Assessment

Consultation requirements also apply where permit applications may affect a European site and the permitting authority (formerly EAW, now NRW) must follow the appropriate assessment (AA) process.⁸³ Similarly, the AA consultation process is now internal to NRW, with no statutory amendment and NRW continuing to use EA guidance documents. In determining applications for consents which could impact on a European site EAW's policy was to 'screen' applications for potential impacts on European sites, and to consult CCW for advice as to whether proposals were likely to have a significant effect, using filtering criteria agreed jointly with CCW, and to 'always determine the case using the best available information and taking full account of advice from CCW'.⁸⁴

Under the EAW guidance,⁸⁵ where the officer 'may reasonably predict that a proposal, plan or project (PPP) may affect the conservation objectives of the features for which the site was designated, excluding trivial or inconsequential effects', based on a 'brief risk assessment' of potential hazards, pathways and scale, then there is a 'likely significant effect'. 'In-combination effects' were considered at this stage, including inter-relationships and cumulative effects of different permissions. Where the officer determined that there was a likely significant effect AA was required. EAW had to 'consider the site specific

⁸² Letter from NRW to Kerry Lewis, Re: Request for information (5 May 2015)

⁸³ Habitats Regulations 2010

⁸⁴ Environment Agency, Policy 181_01 Habitats Directive: implementing the policy, 1 August 2010

⁸⁵ Environment Agency, Operational instruction 183_01 Habitats Directive: taking a new permission, plan or project through the regulations, 10 August 2010

conservation objectives', which define favourable conservation status of the feature on a site specific basis, and 'an adverse effect on integrity is one that prevents the site from maintaining at least the same contribution to favourable conservation status for the relevant feature as it did at the time of its designation.'⁸⁶ Site integrity takes into account the coherence of its ecological structure and functions across the whole area, such that it sustains the habitats and species for which it was designated.⁸⁷ Where EAW concluded that there was no adverse effect on site integrity, notification was sent to CCW for comment. EAW could issue a permit contrary to CCW advice, but a clear audit trail was necessary.⁸⁸ Where EAW could not conclude 'no significant effect' permission could only be granted where there were imperative reasons of overriding public interest and no alternative solutions, in which case compensatory measures must be secured.⁸⁹

2.3. Speaking up for nature?

It is evident from an analysis of the duties of the legacy bodies in the context of nature conservation that the EAW duties were in marked contrast to those of CCW, which did not include any balancing obligations and were squarely focussed on the protection of nature conservation and the promotion to the public of the value of nature. The newly imposed duties of NRW do not reflect those of CCW - nor, indeed, EAW - and are function-specific. An examination of the practical approach adopted by the statutory bodies to the consultation procedures under s.281 WCA 1981 and Regulation 61 Habitats Regulations 2010 reveals that NRW has not changed those procedures to reflect the fact that a process which was

⁸⁶ Ibid.

⁸⁷ WWF-UK Ltd and Another v Secretary of State for Scotland [1999] Env LR 632

⁸⁸ Above n. 85 at 3

⁸⁹ Habitats Regulations 2010, para. 62

formerly carried out between the independent legacy bodies is now entirely internal to NRW.

Whilst there may not be a direct conflict of *interest* between the roles of 'advisor' and 'regulator', there is perhaps a more subtle conflict of *purpose*, given the nature of the duties and functions of each of the legacy bodies. Subsuming the advisory and regulatory roles into a single legal entity in NRW could give rise to legal challenge, since the 'expert' advisor is no longer independent of the 'judge'. Furthermore, the internalisation of the statutory consultation process within NRW and the mechanisms (or lack thereof) to deal with the consequent 'conflict' issues suggests a loss of transparency. The combination of NRW's weaker statutory duties for the preservation of nature and the lack of a robust procedure adapted for internal consultation indicates that nature conservation and biodiversity may have been better served under CCW's stewardship.

3. Post-merger problems

3.1. Functional separation: the *Seaport* case

The 'Can a body consult itself?' question arose, albeit under different legislation, in the *Seaport* case.⁹⁰ The Planning Service section at Department for the Environment for Northern Ireland (DoENI) was the authority responsible for preparing a plan which was subject to Strategic Environmental Assessment (SEA),⁹¹ and upon which it was required to consult the authority responsible for environmental matters - which was the Environment

⁹⁰ Case C-474/10 Department of the Environment for Northern Ireland v Seaport (NI) Ltd [2012] Env LR 21

⁹¹ Directive 2001/42/EEC on Strategic Environmental Assessment; Environmental Assessment of Plans and Programmes (Northern Ireland) Regulations (SR 2004/280)

and Heritage Service, also part of DoENI. Under the national implementing legislation, DoENI was legally precluded from consulting itself, and following Seaport (NI) Ltd's application for judicial review, the domestic court held that the SEA Directive had not been properly transposed, as it had not created a separate body for consultation in such circumstances.⁹² On appeal, the case was referred to the ECJ for a preliminary ruling on, amongst other things, the need for a separate body. The Advocate-General opined that a separate and independent authority was required for credible and effective implementation of the Directive,⁹³ since 'clearly, a body cannot consult itself'.⁹⁴ The ECJ disagreed and it was held that:

Article 6(3) of Directive 2001/42 did not require that another authority to be consulted as provided for in that provision was created or designated, provided that, within the authority usually responsible for undertaking consultation on environmental matters and designated as such, a functional separation was organised so that an administrative entity internal to it had real autonomy. That meant that it was provided with administrative and human resources of its own and was thus in a position to fulfil the tasks entrusted to authorities to be consulted as provided for in art.6(3) and, in particular, to give an objective opinion on the plan or programme envisaged by the authority to which it was attached.⁹⁵

In preparing for the possibility of merger, CCW sought legal advice on the impact of the *Seaport* case on the role of the statutory consultee, asking, amongst other things, whether

⁹² Seaport Investments Ltd, Re Application for Judicial Review [2008] Env LR 23

⁹³ Above n. 90 at 427

⁹⁴ Ibid. at 433

⁹⁵ Ibid. at 426

the ECJ ruling is applicable in Wales to the consultation processes under AA. CCW was advised that

in any situation where the [Single Environment Body] is both competent authority and also required to consult itself as nature conservation body (a prime example being the requirement to consult as part of the appropriate assessment process under Reg 61(3)) then to ensure independence between the competent authority and the nature conservation body functional separation will need to be in effect.⁹⁶

CCW also commissioned expert advice⁹⁷ on the need for 'functional separation' between regulatory and advisory roles within NRW. The advice noted that the creation of separate 'teams' might be inadequate, since functional separation requires: an absence of hierarchical links; protection in regard to employment; separate staff; and separate financial arrangements. The shadow board of NRW noted that if 'the roles and responsibilities are not sufficiently separated or the decisions and how advice has been taken into account is not published, the organisation could be open to legal challenge and/or heightened concern from some customers and stakeholders',⁹⁸ and proposed the use of 'firewalls' (sic) as an 'information barrier to separate and isolate persons who make decisions from those who influence those decisions which could be by a number of mechanisms including functional separation, process, geographic location, number of signatories, or seniority etc.'. ⁹⁹ FOI

⁹⁶ Browne Jacobson LLP, Advice to CCW on the Implications of the ECJ's Judgment in Case 474/10 on CCW's role as a consultant body (2012) (obtained by Freedom of Information Request (hereafter 'FOI requests') to NRW)

⁹⁷ David Tyldesley, Advice to the Countryside Council for Wales - Working Paper: Establishing a functionally separate operation for environmental assessment consultation procedures in light of the proposed establishment of a single body for the management of Wales' natural resources and recent rulings of the Court of Justice of the European Union (obtained by FOI requests to NRW)

⁹⁸ NRW Board Papers, Separation of Duties Update (2013)

⁹⁹ NRW Board Papers, Delivering integrated and transparent decision making within NRW (2012)

responses indicate that there are 'functionally separate Directorates' within NRW for regulation and advice respectively, but it does not appear to be the case that there is the 'real autonomy' noted in *Seaport*,¹⁰⁰ given that both are answerable to NRW's CEO. Without interviewing case officers, it is not possible to ascertain whether the 'functional separation' established within NRW enables those officers providing nature conservation advice to exercise their professional judgement truly independently from those who regulate pollution. The 'one voice' requirement suggests otherwise.

Whilst this study frames the problem from the perspective of protecting biodiversity and nature conservation and questions whether the advice of the statutory consultee for nature conservation will be properly heard by the decision-maker, it is equally valid to query NRW's capacity to deliver independence and impartiality, where it acts as both judge and independent expert, from the perspective of applicants - something which CCW were advised 'may well be explored in legal challenge'.¹⁰¹

3.2. Two opinions, 'One Voice'

The National Assembly's pre-merger report into the single body noted the potential for conflict and recommended that WG 'ensures that robust arrangement are made to separate permitting and advisory functions of a single body'¹⁰²; the Minister's response rejected their concerns, stating that there 'is no conflict of interest between the role of advisor and

¹⁰⁰ Above n. 90 at 426

¹⁰¹ Ibid.

¹⁰² National Assembly for Wales Environment and Sustainability Committee, Report: The Business Case for a Single Environment Body (2012) at 12

regulator – both will have the same core duty to protect the environment as the bodies individually do now', but that he would 'ask officials to consider how we best achieve transparency in these arrangements'.¹⁰³ The second consultation paper maintained that position:

Where the body is regulating other organisations or individuals and is also a statutory consultee, there is no conflict of interest. However, the consultation requirements (which would mean the single body consulting itself) will not be needed.¹⁰⁴ This is because of the other general duties placed on the body which will require it to fully consider matters such as conservation, biodiversity, landscape, access and historic features in its regulatory decision-making, in accordance with European and other legislation. However, where the consultation requirement arises from EU obligations, for example Environmental Impact Assessment or Habitats Regulations, requirements for the body to consult itself will be retained.¹⁰⁵

With regard to NRW's statutory duties, the position is somewhat more complex than that presented by the Minister. Whilst its statutory purpose embraces the sustainable use, maintenance and enhancement of Wales' natural resources, it does not require *protection* of the environment per se, and the Minister's assertion that the 'advisor NRW' and the 'regulator NRW' will have the same core duty to protect the environment is further undermined by the fact that the statutory duties differ according to function. As already noted, in exercising a nature conservation function, the NRW officer must 'further nature

¹⁰³ Written Repsonse by the Welsh Government to the report of the Environment and Sustainability Committee: The Business Case for a Single Environment Body (2012)

¹⁰⁴ It is not clear why WG considers that there will be no requirement for the body to consult itself other than under EU law, given, for example, the statutory requirement under WCA 1981, s.28I.

¹⁰⁵ Above n. 81

conservation'¹⁰⁶ and have regard to 'actual or possible ecological changes',¹⁰⁷ whereas the officer exercising a pollution control function is not required to further nature conservation, but must have regard to its 'desirability'. In most cases it will undoubtedly be clear what type of function an NRW officer is exercising, and therefore apparent which duties apply to the task in hand. However, there may be situations where the functions cross over or conflict. The proper exercise of the duties is therefore complicated: not only will the decision-making officer need to be clear about the nature of the function being exercised, but, where both are relevant to an outcome - as under the statutory consultation processes outlined above - NRW will need to reach a final 'one voice' conclusion before publishing any decision.¹⁰⁸ Presumably, since they are permitted to reject any nature conservation advice offered to them, the pollution control officers have the last word. Reported cases of pre- or post-merger disagreement between officers carrying out pollution control functions and nature conservation functions of NRW are rare,¹⁰⁹ and NRW is unable to provide any readily available data on the number of AA cases and the frequency of dispute over nature conservation concerns.¹¹⁰

As noted, respondents to the consultation expressed concerns over the separation or otherwise of the advisory and regulatory functions,¹¹¹ and WG indicated that NRW would develop a publication scheme for decision documents. Although there was broad support among respondents to the WG consultation - from conservation groups, professional

¹⁰⁶ NRW Establishment Order, para. 5A(1)

¹⁰⁷ NRW Establishment Order, para. 5B

¹⁰⁸ Above n. 8 at 5

¹⁰⁹ Pembroke Power Station being a notable example.

¹¹⁰ Letter from NRW to Kerry Lewis, Re: Request for information - EPR and nature conservation (30 June 2014)

¹¹¹ Above n. 11

bodies, the farming sector and industry alike - for the proposals regarding statutory consultation procedures, and despite WG's commitment to an NRW publication scheme, some questioned whether such a scheme would adequately deliver the required transparency, with others calling for complete independence of the two elements in the decision making process.¹¹² Whilst the publication of information is welcomed, public access to an application or a decision does not amount to an effective dispute resolution mechanism for dealing with conflicts between the regulatory and advisory roles.

3.3. Challenging the decision-maker: the voice of nature

As noted, FOI requests have revealed that the guidance to NRW permitting officers was not amended to reflect the fact that statutory consultation is now an internal, rather than external, exercise, and the implications that this may have with regard to, for example, transparency. It is also immediately apparent that, notwithstanding any 'functional separation' or 'firewalls', nature conservation officers at NRW are unable to bring a legal challenge against decisions made by permitting colleagues, regardless of whether nature conservation advice has been properly taken into account, even where it results in an illegal, irrational or improper permitting decision: NRW cannot seek judicial review of its own decisions. According to WG, 'the vast majority of consents are not contentious',¹¹³ and whilst judicial review challenges by CCW may have been rare, or even non-existent, pre-

¹¹² See, for example, responses to Natural Resources Body for Wales (additional consultation) (2012) from Welsh Conservatives, North East Wales Biodiversity Network, RSPB, NFU, City and Council of Swansea Nature Conservation Team and the Woodland Strategy Advisory Panel - who arguably cover a diversity of views on nature conservation.

¹¹³ Welsh Government, Natural Resources Wales: Proposed Arrangements for Establishing and Directing a New Body for the Management of Wales' Natural Resources WG14766 (2012) at 33

merger,¹¹⁴ it is nevertheless the case that an important check on the procedures of the permitting authority in relation to SSSIs and European sites has been removed. The creation of NRW has abolished a statutory body which had previously had the legal standing to challenge the decisions of the regulator. Given the legal and financial difficulties faced by individuals or NGOs seeking judicial review, this outcome should have been addressed during the development of WG's proposals for the shape of NRW, and a suitable alternative put forward.

WG's power under PBA 2011 is restricted in that an order must not remove any necessary protection. It also states that it can only make an order if it 'does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise'.¹¹⁵ Its relevance here is twofold: was CCW's right to seek judicial review of the EA permitting decisions a 'necessary protection' for nature conservation; and could CCW reasonably have expected to continue to exercise that right? If so, WG's failure to ensure the continued existence of the nature conservation body's right to seek judicial review may amount to breach of statutory duty. An alternative argument is that the public had a legitimate expectation that WG would maintain the nature conservation body's right to challenge the decisions of the permitting authority. At a time when the policy commitment to the improvement and maintenance of the condition of SSSIs and European sites is purportedly being strengthened in order to meet domestic and international biodiversity targets, the creation of NRW as a single body has shifted the burden of

¹¹⁴ In a response to FOI requests, NRW was unable to confirm whether CCW had brought or considered judicial review proceedings against EAW with regard to consultation under WCA 1981 s28I or Habitats Regulations 2010 para. 61(5).

¹¹⁵ PBA 2011, s.16

monitoring the decisions of the environmental permitter – which is essentially an executive function – away from a statutorily-enabled and publicly funded body and placed reliance on the third sector and the general public to do so. If the substitute check on the power of the permitting authority is that NGOs or members of the public can seek judicial review of its decisions, then it is vital that complete information regarding the permits and the decision-making process is available to those groups, at the appropriate time.

The NRW website indicates that, under its publication scheme,¹¹⁶ information available to the public includes 'How we make decisions', as well as registers of permitting applications and decisions. FOI requests to NRW asked for statistical information regarding: the number of permit applications received by EAW/NRW; the number of permits issued by EAW/NRW in line with and contrary to nature conservation advice; and the number of occasions where CCW took further action¹¹⁷ where a permit was issued contrary to advice. Further FOI requests sought disclosure of the nature conservation advice itself, for permits issued contrary to that advice. NRW indicated that it did 'not capture and retain all this information', but that all decision documents, together with responses from statutory consultees are publicly available and that an appointment could be made to attend NRW to view the documents.¹¹⁸ It is beyond the parameters of this paper to conduct an empirical review of this information, but the issue is worthy of further research as NRW matures: without adequate public access to such information, it is impossible for an individual or organisation to establish grounds for judicial review. Further investigation may reveal that

¹¹⁶ Natural Resources Wales, Publication Scheme (2014) <<http://naturalresources.wales/about-us/contact-us/request-information/publication-scheme/?lang=en>> accessed 10 June 2015

¹¹⁷ i.e. Seeking director level resolution of the dispute, referring the case to the Ministers, or seeking judicial review of the decision to issue the consent.

¹¹⁸ Above n. 110

such cases are rare, and that the judicial review mechanism thus provides adequate protection in the circumstances. However, it seems extraordinary that members of the public and NGOs should have to rely on local knowledge or leaked information to be able to ask the 'correct' FOI questions, or have adequate time and resources to examine the registers to establish whether the NRW permitting officers have taken the nature conservation advice properly into account.

4. Case study: Pembroke Power Station

Disagreement between the statutory conservation advisor and the regulator is not a merely theoretical concern: a widely reported¹¹⁹ example of the legal and environmental consequences of the failure of a competent authority to follow the advice of the nature conservation body as statutory consultee is that of Pembroke Power Station.

In 2005, the developer began a process of applications for multi-agency consents to develop a new gas-fired power station on the site of a former oil-fired power station on land to the south side of the Milford Haven Waterway SSSI (MHWSSSI), which forms part of the Pembrokeshire Marine Special Area of Conservation (PMSAC). In addition to applications to the (now) Department for Energy and Climate Change (DECC) for construction consent,¹²⁰ Milford Haven Port Authority (MHPA) for a dredging licence, and the Marine Fisheries

¹¹⁹ See for example 'Pembroke power station may breach eco law' BBC News Online (10 December 2012) <<http://www.bbc.co.uk/news/uk-wales-south-west-wales-20660152>> accessed 8 June 2015; ENDS Report, 'EU accuses UK of acting illegally in granting gas plant permit' (2012) <<http://www.endsreport.com/36677/eu-accuses-uk-of-acting-illegally-in-granting-gas-plant-permit>> accessed 8 June 2015; 'EU: Pembroke power station breaches water standards' Utility Week (15 July 2014) <<http://www.utilityweek.co.uk/news/eu-pembroke-power-station-breaches-water-standards/1032222>> accessed 8 June 2015

¹²⁰ Electricity Act 1989, s.36

Agency for a disposal licence,¹²¹ the developer sought consent from EAW for a water abstraction licence and a site permit,¹²² including permission to discharge treated cooling water.¹²³ The applications for the consents triggered the need for screening for AA,¹²⁴ so that the relevant competent authorities needed to consider whether the proposals were likely to have a significant effect on the PMSAC, either alone or in combination with other PPP, and were required to consult CCW for advice. During the AA process conflict arose between the competent authorities and CCW as statutory consultee. Despite an extensive mediation process which failed to resolve the conflict, CCW did not seek judicial review of EAW's decision.¹²⁵ Instead, a complaint was made to the European Commission by Friends of the Earth Cymru (FoE) alleging breaches of EU law, including the Habitats Directive, the IPPC Directive and the Water Framework Directive.¹²⁶

Central to FoE's complaint was the failure of the relevant competent authorities to properly take into account CCW's advice in the AA process - although it should be noted that the specific obligation to consult the nature conservation body arises out of the national implementing legislation and is not a requirement of the Directive. Throughout the consenting process, and over a number of years, CCW voiced concerns to EAW, as well as WG and DECC, over the conduct of the AA. It was CCW's view that a single AA was needed for the

¹²¹ Milford Haven Conservancy Act 1983

¹²² Under Water Resources Act 1991 s.24 and the Pollution Prevention and Control (England & Wales) Regulations 2000 (SI 2000/1973), now covered by Environmental Permitting (England & Wales) Regulations 2010

¹²³ The abstraction and discharge consents were for use in the proposed 'direct once-through water cooling system', which would draw cold water from the estuary, treat it with the biocide sodium hypochlorite and return it to source some 7 - 8°C warmer.

¹²⁴ Then under Habitats Regulations 1994, para. 48, now Habitats Regulations 2010, para. 61

¹²⁵ Above n. 114

¹²⁶ Friends of the Earth, Pembroke Power Station: Complaint to European Commission (June 2010)

construction, operation and decommissioning of the power station, including its expected emissions and discharges into the environment and its water abstraction needs, and associated works (such as dredging and sea disposal), and in combination with all other plans and projects that already affect, and will or could affect, the PMSAC.¹²⁷

Instead, each competent authority dealt with its application in isolation, such that DECC limited itself to determining the application for s.36 construction consent without considering the 'in combination' effects of the operational phase of the development, arguing that 'the potential impacts relate to the operation of the Development, which will be controlled by the EAW through the issue of a PPC Permit and water abstraction licence, the appropriate competent authority with necessary expertise to undertake the AA relating to operational activities is the EAW.'¹²⁸ DECC issued the s.36 consent and, before the EAW's AA of the operational effects was concluded, construction began.

Subsequently CCW advised that EAW's own AA was flawed, not only since the construction process was underway before its AA was concluded, but also because it had not properly applied the specific conservation objectives for the site (which were that the favourable conservation status of the relevant species and habitats should be maintained or restored), nor the 'site integrity' test for the PMSAC in determining 'likely adverse effect'.¹²⁹ CCW disagreed with EAW's conclusion that there would be no adverse effect on the integrity of the site: many of the relevant habitats and species were already in an unfavourable

¹²⁷ Ibid. at 15

¹²⁸ Letter from DECC to RWE npower plc, Decision: Application for consent to construct and operate a combined cycle gas turbine generating station at West Pennar, Pembrokeshire (5 February 2009) at para. 4.10

¹²⁹ CCW, Final Advice on the Impacts of Pembroke Power Station Development (December 2011)

conservation status and further deterioration was likely to occur as a result of the abstraction and discharge process.¹³⁰ Both the MHWSSSI and the PMSAC are considered to be in poor condition and the 'evidence available to the Commission would indicate that the [PMSAC] and its protected features have already suffered deterioration and significant disturbance from past activities and failure by [the UK] Government to halt damaging trends.'¹³¹

In the infringement memo¹³² which announced that it was issuing a confidential reasoned opinion to the UK Government, the Commission observed that

development consent should only be given after all the potential environmental impacts have been assessed. This does not appear to have been the case with the Pembrokeshire plant, where development and construction consents as well as a water abstraction licence and a permit for the dredging of the cooling system intake and outflow were granted before the full environmental assessments were completed. As a result, warm water with a heavy biocide load is currently being returned to the protected Milford Haven waterway. Many smaller fish, their eggs and other smaller organisms are affected by the cooling system, which passes large quantities of water from one end of the SAC through the plant and out the other side.

¹³⁰ Ibid.

¹³¹ Letter from the Secretariat-General of the European Commission to the UK permanent representative to the EU, Letter of formal notice - Infringement No 2012/4149 (24 October 2012) at 11

¹³² European Commission, 'Memo: July infringements package: main decisions - Environment: Commission asks UK to act on Pembroke power station' (10 July 2014) <http://europa.eu/rapid/press-release_MEMO-14-470_en.htm> accessed 8 June 2015

It remains to be seen whether the Commission will pursue infringement action. Should it do so, it will be on the basis of the UK's failure to comply with the requirement to 'agree to the plan or project only after having ascertained that it will not affect the integrity of the site concerned',¹³³ rather than the national legislation and guidance which requires the competent authority to take the nature conservation advice of the statutory body into account in the decision making process. Not only would such proceedings vindicate CCW officers' concerns during the AA, but the UK Government may find itself facing action by the developer, which will almost certainly be required to review its processes at the plant, if not to close it down.

The Pembroke Power Station dispute is undoubtedly one of NRW's concerns in seeking legal advice as to the application of Articles 6.3 and 6.4 of the Habitats Directive, providing training to embed a common understanding of the 'single voice' approach¹³⁴ and consolidating its written guidance to officers.¹³⁵ In the meantime, it is perhaps fortunate for nature and biodiversity, that the PMSAC is protected under EU legislation and that the Commission has taken an interest in determining compliance with the requirements for the protection of Natura 2000 sites. Had Pembroke Power Station affected a SSSI only it would be considerably more difficult to challenge the decisions, since the national legislation clearly permits the pollution control authority to balance environmental, social *and* economic factors. For Natura 2000 sites, that balancing approach is only permissible where there are imperative reasons of overriding public interest and no alternative solutions. It is

¹³³ Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, Art. 6.3

¹³⁴ An analysis of the training provided to officers may be useful to establish an understanding of the operation of NRW statutory duties in practice, to determine how they are being applied by different officers in different contexts.

¹³⁵ Above n. 8

argued that the problem which arises in this case - and indeed in any other case where there is a conflict - is that, under national legislation, the competent authority has the discretion to override the ecological evidence and advice provided by the nature conservation body and weigh other factors in the balance. Formerly, this allowed EAW to set aside the advice of CCW; with NRW's diluted statutory duties for nature conservation, it now allows 'NRW pollution control' to do the same with regard to 'NRW nature conservation's' potentially watered-down advice.

5. Conclusion: Has the statutory voice for nature been silenced?

Following concerns raised during WG's consultation on the proposals for a single environment body that its creation may result in a lack of transparency and a lower standard of protection for nature, the aim of this research has been to analyse and comment on the effect of the creation of NRW on the voice of the statutory body for nature conservation, and whether it can now be properly heard - in the courts, in the public domain and within the statutory body itself. In assessing the strength of the nature conservation body's voice, this study has analysed the statutory duties with regard to nature conservation in the legacy bodies as compared with those of NRW. It has concluded that, where nature conservation is concerned, the NRW duties to apply ecological criteria¹³⁶ to cases before it are weaker than those of the former CCW,¹³⁷ balanced as they now are against an overall duty on NRW to consider the social and economic well-being of individuals, businesses and communities.¹³⁸

¹³⁶ NRW Establishment Order, paras. 5A and 5B

¹³⁷ EPA 1990, s.131

¹³⁸ NRW Establishment Order, paras. 5E

In order to give a context to the discussion, it has focussed on the role of the nature conservation body as a statutory consultee in the pollution control and prevention consenting process, where the proposed operations might affect a site which has been designated for nature conservation and the competent authority is required to seek the advice of the nature conservation body before reaching a decision to issue or refuse consent.¹³⁹ It is evident from the research carried out that both legislation¹⁴⁰ and internal guidance¹⁴¹ issued to decision-making officers anticipate situations where the advice of the nature conservation body may be set aside by the competent authority, and that this does occur in practice,¹⁴² potentially leading to conflict between the competent authority and the nature conservation body. The mechanisms offered by WG to deal with disagreement in such situations are functional separation across NRW directorates and the development of a publication scheme. However, these protections may be inadequate for the purpose they are designed to serve. It is apparent that CCW's ability to publicly voice its concerns where it was of the opinion that ecological evidence was not properly being taken into account, or given due weight, in the consenting process has now been lost. Such processes are now internal to NRW, which is required to speak with 'one voice' - separation of functions and publication of decision documents do not alter this effective requirement 'to agree'. As part of NRW, rather than an independent legal entity, the statutory nature conservation advisor no longer has a legal personality separate from the pollution control regulator, and cannot challenge decisions through the judicial review process. However, it is also noted that, in the

¹³⁹ WCA 1981, s.28I; Habitats Regulations 2010, para. 61(3)

¹⁴⁰ E.g. WCA 1981, s.28I(6)

¹⁴¹ E.g. Above at nn. 73, 84, 85

¹⁴² E.g. Pembroke Power Station.

case of Pembroke Power Station, despite an arguable case that EAW's conclusion that the operations would not affect the integrity of the PMSAC was irrational - and therefore judicially reviewable - CCW did not bring its own legal challenge.¹⁴³

At the time of writing NRW is some two years old and many of these issues may be teething problems. New guidance and procedures continue to be put in place as the organisation becomes established,¹⁴⁴ and the fundamental changes promised by the Environment (Wales) Bill¹⁴⁵ may resolve matters. In the meantime, it is apparent that concerns raised during the NRW consultation process over the potential for conflict and loss of transparency within the new organisation, and a weakening of duties in relation to nature conservation were not without foundation. Where it acts as statutory consultee, the nature conservation body, whilst not yet silenced, has, for the time being, been muted within and without the walls of NRW.

¹⁴³ Above n. 114

¹⁴⁴ Above n. 8

¹⁴⁵ Above n. 4